APPENDIX A

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

I. Section 3, Executive Order 9835, 12 F. R. 1935

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

II. Pertinent Provisions of Executive Order 10450, 18 F. R. 2489

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

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Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

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(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or

subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

* * * * *

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order; and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

III. Attorney General's Rules of Procedure for the Federal Employee Security Program—Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 C. F. R. Part 41

Section 41.1 NOTICE TO AND BY ORGANIZATIONS. (a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the

organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the Federal Register, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the Federal Register, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the Federal Register.

(c) The notice of contest provided in this Part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

Section 41.2 Statement and Interrogatories by Attorney General. Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

Section 41.3 Reply by Organization. The organization, within sixty days following receipt of such statement and

interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

Section 41.4 Request for Hearing. Any organization filing a reply as provided in this Part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

Section 41.5 Notice of Hearing. Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

Section 41.6 Default. When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

Section 41.7 Hearing Board or Officer. For the purpose of conducting any hearing as provided in this Part the Attorney General shall assign such officer or board as he shall deem necessary.

Section 41.8 Hearing. (a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this Part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

Section 41.9 Recording of Testimony. The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

Section 41.10 Determination. Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, repliés to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

Section 41.11 PREVIOUS DESIGNATIONS NOT AFFECTED. The promulgation of the rules of procedure contained in this Part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

APPENDIX B

OPINIONS AND JUDGMENT BELOW

Before PRETTYMAN, WILBUR K. MILLER and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* These appeals were heard together because they present practically identical questions. Due to slight factual differences, we shall discuss the cases separately.

No. 12,975. The Attorney General of the United States on April 29, 1953, notified the Association of Lithuanian Workers, which is chartered under New York law as a fraternal insurance company, that he proposed to designate it as an organization coming within the purview of Executive Orders 9835 and 10450.[1] The Association on

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[1] Executive Order 10450, 3 C.F.R. 72 (Supp. 1953), provides in pertinent part:

> "Sec. 12. . . . [T]he Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency."

Paragraph 3 of Part III of Executive Order 9835, 3 C.F.R. 129, 131 (Supp. 1947), provides:

> "The Loyalty Review Board shall currently be furnished by the Department of Justice the names of each foreign or

May 8 gave notice of contest, and on July 8 the Attorney General sent it a statement of the grounds of the proposed designation and a set of interrogatories with respect thereto.[2] No reply to the statement and interrogatories was filed by the Association at any time. Instead, under date of September 8, 1953, it wrote to the Attorney General asserting its innocence, complaining that the interrogatories were impossible to answer, and attacking the hearing procedure as "unfair and undemocratic and contrary to the laws and traditions of this Nation." The Association did not ask that the interrogatories be modified or withdrawn, nor did it seek a conference or hearing concerning them. Having decided for itself that both the interrogatories and the prescribed hearing procedure were improper and unacceptable, the Association washed its hands of the whole matter and issued an ultimatum to the Attorney General in the closing paragraph of its letter, which we quote:

> "In view of the foregoing, we respectfully request that you discontinue this proceeding against the Association. Should you persist in your avowed purpose

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domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

[2] These steps were in accord with the rules (28 C.F.R. Part 41) governing procedure under Executive Order 10450, which further provide that within 60 days after the receipt of such statement and interrogatories, the organization may file a verified reply signed by its executive officers, together with a request for a hearing, which must be granted; that failure of the organization to file a reply within the 60-day period shall constitute an acquiescence in the designation.

to list it, the Association will have no alternative except to seek justice in the courts."

After the 60-day period for reply had ended, the Association engaged counsel, who wrote the Attorney General demanding a due process hearing concerning the proposed designation. His letter did not tender a tardy reply signed and verified by the Association's executive officers, and did not itself amount to a formal reply. This was pointed out to counsel. He was also advised that the Association had not filed a reply within the period permitted therefor but in its letter of September 8 had rejected the administrative hearing which would have been available after reply and upon request. In January, 1954, the Attorney General designated the Association, holding that, under the rule, its failure to reply amounted to acquiescence.

Thereupon the Association filed this action in the United States District Court for the District of Columbia to enjoin the Attorney General from "continuing the designation" and to require him to notify all federal departments and agencies, and the public, that the designation "is withdrawn." The complaint attacked the two Executive Orders as unconstitutional and pleaded the procedures and regulations thereunder are illegal and violative of due process. It charged the Attorney General had violated the Executive Orders by designating the Association without appropriate investigation and without notice and hearing.

The Attorney General answered. He outlined the information concerning the Association which his investigation had developed and upon the basis of which he had proposed the designation, and alleged the Association had failed to exhaust its administrative remedies and so was not entitled to judicial review. He then moved for summary judgment or in the alternative for judgment

on the pleadings. The latter was granted by the District Court and this appeal followed.

We had before us in *National Lawyers Guild* v. *Brownell*, 96 U. S. App. D. C. 252, 225 F. (2d) 552 (1955), *cert. denied* 351 U. S. 927 (1956), a situation almost identical with that presented here.[3] The Guild was notified by the Attorney General that he proposed to designate it. It gave notice of contest, after which it received from the Attorney General a statement of grounds and interrogatories. Without replying thereto, the Guild sued in the United States District Court for judgment declaring Executive Orders 9835 and 10450 unconstitutional and void and the procedures adopted by the Attorney General under those Orders unconstitutional. It also attacked the interrogatories submitted to it. We held that the Executive Orders and procedures prescribed thereunder are valid; that a claim of constitutional invalidity does not negative the requirement for exhaustion of remedies and that the proper place to test the interrogatories in the first instance is before the administrative body. In short, we held the Guild must exhaust the proffered administrative remedy, and so affirmed the District Court's grant of summary judgment to the Attorney General. These holdings are dispositive of the present case unless, as it claims, the Association did not reject but rather was wrongfully denied the administrative remedy.

As we have seen, the appellant did not reply to or challenge the interrogatories before the administrative body, which would have entitled it to a earing. Instead, it notified the Attorney General that he must withdraw the designation proceeding or be faced with litigation. This was clearly a refusal to utilize the administrative process, and precludes judicial review of the grounds for and the propriety of designation. In *National Council of*

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[3] Cf. National Council of American-Soviet Friendship v. Brownell, No. 13,185, decided by this court February 28, 1957.

American-Soviet Friendship v. *Brownell*, No. 13,185, decided February 28, 1957, we rejected the appellants' insistence "that they may default and still continue to litigate," saying,

> ". . . We find no support in the authorities for any such contention, indeed the cases are otherwise. The plight of the appellants is of their own choice and of their own making. We are satisfied that the principles underlying the exhaustion rule are clearly applicable here. . . . ."

The Association says that "even a rejection of the administrative remedy would not bar judicial determination *after designation* of whether the designation was made by an invalid procedure and whether the designation power is unconstitutional." If it be assumed that when these questions are raised after designation the court should answer them despite failure to exhaust administrative remedies, the Association is no better off; for in the *Lawyers Guild* opinion we upheld the constitutionality of the Executive Orders and the validity of the procedures thereunder. We adhere to that holding.

No. 12,976. This case differs from the other in that, when the American Lithuanian Workers Literary Association received from the Attorney General a statement of grounds for designation with interrogatories, it seasonably filed what it termed a reply thereto which was signed and verified by its president and secretary.

The document merely says the Association is engaged in innocent activities and does not come within the purview of Executive Order 10450; that the alleged authority of the Attorney General thereunder and under his own regulations is neither expressly nor impliedly authorized by the Constitution and is violative of the First, Fifth, Ninth and Tenth Amendments. The reply concluded with this paragraph:

> "Specifically, proper standards are not set forth in the Executive Order and in the regulations promulgated by the Attorney General; the so-called standards are vague, indefinite and without clear meaning, and the Regulations perpetuate the uncertainty. The proceedings should be dismissed."

A hearing was not requested, even though the Association had purportedly replied. Its arguments for reversal are substantially the same as those we considered and rejected in the previous case.

The so-called reply was not a response to the Attorney General's statement of grounds and interrogatories, but a demand for dismissal on pleas of innocence and unconstitutionality. Having failed to reply, the Association cannot obtain judicial relief from designation.

The judgments are affirmed.

PRETTYMAN, *Circuit Judge*, concurring in part and dissenting in part: In No. 12976, *American Lithuanian Workers Literary Association, Inc.* v. *Brownell*, I concur in the result reached by the majority. The Literary Association failed to make to the Attorney General an objection to the proffered procedure with sufficient specificity to enable him to pass upon the challenge. It merely asserted that the whole proceeding was unconstitutional.

In No. 12975, *Association of Lithuanian Workers* v. *Brownell*, I would reverse. I think the Workers were not proffered due process and they adequately tried to obtain valid consideration from the administrative agency.

1. The Regulations[1] provide that "The reply [of an organization to a statement of charges and interrogatories] shall answer each interrogatory completely and with particularity and shall be limited to statements of

[1] 18 FED. REG. 2620 (1953) 28 C.F.R. § 41.3 (Supp. 1955).

fact." They provide further[2] that "Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing." Thus the Regulations afford no opportunity for a hearing except upon the filing of a reply to each interrogatory completely and with particularity. I take it that "completely and with particularity" means exactly what those words ordinarily mean.

2. Many of the interrogatories submitted to the Workers were impossible—not merely difficult but impossible—to answer completely and with particularity. Interrogatory (6) will serve as an example; others are like it. Included in the manifold intricacies of that interrogatory was:

> "(a) List the names and addresses of all those persons who are presently members of the L.D.S. [the Workers].
> "(b) Have any of those persons listed * * * at any time been
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> * * * *
>
> "iii. sympathetically associated with
> "* * * any * * * group officially designated by the Attorney General pursuant to Executive Orders 10450 and 9835?
> "(c) If the answer to Interrogatory 6(b) or any part thereof is in the affirmative, list the names and addresses of all such persons and indicate the periods during which they were
>
> * * * *
>
> "iii. sympathetically associated * * *."

There are some 7,000 members of the Workers, and there are some 250 organizations on the Attorney General's list. It was impossible for anyone to say under oath whether any of 7,000 members had ever at any time been sympathetically associated with any one of 250 organizations.

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[2] *Id.*, 28 C.F.R. § 41.4.

Perhaps another illustration will emphasize the point. Interrogatory (7) includes this inquiry:

> "(a) List the names and addresses of persons who have, at any time, been * * * invited to speak or to appear as guests by the * * * various lodges [of the Workers] * * * or by * * * members of the * * * lodges * * * at any meetings * * * conducted * * * by * * * any of its * * * lodges or branches.
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> * * * * *
>
> "(c) Have any of those persons listed * * * at any time been
>
> * * * * *
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> "iii. sympathetically associated with * * * any * * * group officially designated by the Attorney General * * *?"

There are 167 lodges in the Association. Nobody, I venture to assert, could list all the persons invited to speak or to appear as guests at every meeting for twenty-three years of all of 167 lodges by any and all of 7,000 members.

A reading of all of the interrogatories as they appear in the record will demonstrate my point beyond peradventure of doubt. They were imposible to answer.

3. From the foregoing the conclusion is clear that the Workers were effectively and in fact denied opportunity for hearing. They were not proffered a hearing unless they answered every part of every interrogatory completely and with particularity. The proffer of a hearing was a nullity, being conditioned upon an absolute impossibility.

4. The Workers made due and timely response to the interrogatories. They wrote the Attorney General under date of September 8, 1953, which was within the allowed sixty days from July 13, 1953, the date of receipt of the statement and interrogatories, saying that the statement had been discussed at a meeting of the

General Executive Board "and we are writing you accordingly." The letter was signed in the name of the Association by the president and the secretary. They said in part: "Your rules and requirements make it impossible for the Association to have a hearing in regards to your proposed listing. For example, you would require the officers, under penalty of perjury, to furnish you with names and addresses of all of its members and to indicate with respect to each and every one, what his political beliefs, affiliations and 'sympathetic associations' are or ever were. This requirement is, as you must know, impossible to meet." The Association said it had no records of any political affiliations of its members and that "Therefore, it would be impossible for us to supply you with this information".

Surely the foregoing was sufficient to put the Attorney General on notice that the Association had no means by which to answer his interrogatories and that they were impossible to answer. The Workers could not then ask for a hearing, because the Regulations specifically require that a "reply as provided in this part" must be the basis for the request for a hearing. I think it cannot now be held that the Workers are wholly foreclosed because they did not request a hearing which under the Regulations they could not request.

On October 4, 1953, the Workers made a second response, written by counsel. He was quite specific in saying that "aside from those numbered (1), (2) and (3), the Interrogatories are improper in that they are impossible to answer". And he cited, by way of example, Interrogatories (5)(b) and (c), (6)(b) and (c), and (7)(c) and (d), saying: "* * * the Association does not have the information relating to political beliefs or affiliations called for by [those interrogatories]." Counsel continued by specifically stating that the Association desired a hearing "but does not believe that such a hear-

ing should be conditioned upon responses to Interrogatories (4) to (23), inclusive".

5. In response to the charges forwarded to them, as distinguished from the interrogatories, the Workers' letter of September 8th made clear and careful response, categorically denying the purport of the involved charges and affirmatively asserting the activities to which the Association is "confined strictly".

6. I think the proffer of a hearing was null, that the Workers were not afforded due process, and that they effectively challenged to the administrative officer the validity of the proffered procedure. I would remand to the Attorney General with instructions either to revise the procedure so as to proffer effectively and actually an opportunity for hearing or to dismiss the charges.

7. I am in considerable doubt as to the validity of parts of the Regulations. For example, Section 41.3 provides:

> "Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers."

I would not know what "facts" the questions about sympathetic association (as in Interrogatories (6) and (7) above discussed) "refers" to. And the rule that an "evasive reply" to any part of an interrogatory shall be deemed an admission of "the facts" to which such part "refers" is particularly objectionable. Other parts of the Regulations are of doubtful validity, in my view, but it is not necessary that I reach the question and so I do not.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

C. A. 406-54

No. 12,975

ASSOCIATION OF LITHUANIAN WORKERS, *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Appellee*.

April Term, 1957

C. A. 1252-54

No. 12,976

AMERICAN LITHUANIAN WORKERS LITERARY ASSOCIATION, INC., *Appellant*,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Appellee*.

Appeals from the United States District Court for the District of Columbia.

Before: Prettyman, Wilbur K. Miller and Danaher, Circuit Judges.

Judgment

These appeals came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, affirmed.

Dated: May 9, 1957.

Per Circuit Judge Wilbur K. Miller

Separate opinion by Circuit Judge Prettyman concurring in the result in No. 12,976 and dissenting as to No. 12,975.